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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2000

Case Number 00-483

Supreme Court, U.S.
FILED
OCT 16 2000
CLERK

CRAIG A. HANKS, *Superintendent,*
Wabash Valley Correctional Facility,

Petitioner,

vs.

JOSEPH W. FINFROCK,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, Joseph F. Finfrock, in accordance with Rule 39 of this Court, respectfully moves the Court to proceed in forma pauperis, and in support thereof states as follows:

1. He is an indigent inmate of the Wabash Valley Correctional Facility, Carlisle, Indiana,.

2. He was granted in forma pauperis status by the United States District Court for the Southern District of Indiana, Indianapolis Division, and the United States Court of Appeals for the Seventh Circuit, and the Court of Appeals appointed the undersigned attorney to act as *amicus curiae* to advocate issues on behalf of Respondent.

3. Attached hereto and incorporated herein by reference is Respondent's declaration in the form prescribed by the Federal Rules of Appellate Procedure, Form 4.

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For these reasons, Joseph F. Finfrock, respectfully moves the Court for leave to file the attached Brief in Opposition without the filing of costs and to proceed in forma pauperis before this Court.

Dated October 16, 2000

Respectfully submitted,

HOWARD B. EISENBERG

P.O. Box 1476
Milwaukee, WI. 53201-1476

(414) 288-1768
FAX (414) 288-6403
E-MAIL: Howard-Eisenberg@excite.com

ATTORNEY FOR RESPONDENT

AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

SUPREME COURT OF THE UNITED STATES

CRAIG A. HANKS, *Petitioner*,

v.

Case No. 00-483

JOSEPH W. FINFROCK, *Respondent*.

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C § 1621.)

Signed: Joseph W Finfrock

Instructions

Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

Date: 10-2-00

My issues on appeal are: Respond to State of Indiana's Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

I have been in prison for the past 7 years. I was just recently transfered from Wabash Correctional Facility where I was at for 3 3/4 years. Now I am at Westville Corrections in Westville Indiana where I have been since 8-24-00, I have no money on my account at this time. I have 9¢ on my account as of 10-2-00, 9¢ is all I have to my name Thank You!

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ NA	$ 0	$ NA
Self-employment	$ 0	$ NA	$ 0	$ NA
Income from real property (such as rental income)	$ 0	$ NA	$ 0	$ NA
Interest and dividends	$ 0	$ NA	$ 0	$ NA
Gifts	$ 41.00	$ NA	$ 0	$ NA
Alimony	$ 0	$ NA	$ 0	$ NA
Child support	$ 0	$ NA	$ 0	$ NA
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ NA	$ 0	$ NA
Disability (such as social security, insurance payments)	$ 0	$ NA	$ 0	$ NA
Unemployment payments	$ 0	$ NA	$ 0	$ NA
Public-assistance (such as welfare)	$ 0	$ NA	$ 0	$ NA
Other (specify): _____	$ 0	$ NA	$ 0	$ NA
Total monthly income:	$ 41.00	$ NA	$ 0	$ NA

2. List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
Sally's place	Chesterfield In	9-21-93	600.00

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.) I am not married.

Employer	Address	Dates of employment	Gross monthly pay
NA			
NA			
NA			

4. How much cash do you and your spouse have? $ .9¢
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution have spouse has	Type of account	Amount you	Amount your
None		$ 0	$ 0
None		$ 0	$ 0
None		$ 0	$ 0

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home (Value)	Other real estate (Value)	Motor vehicle #1 (Value)
None	None	Make & year: None
None	None	Model: None
None	None	Registration #: None

Motor vehicle #2 (Value)	Other assets (Value)	Other assets (Value)
Make & year: None	None	None
Model: None	None	None
Registration #: None	None	None

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
None	None	None

None	None	None
None	None	None

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
Angela Fintock	daughter	9
Danny Smith	son	11

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real-estate taxes included? ___Yes ___No N/A Is property insurance included? ___Yes ___No N/A	$ 0	$ 0
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 0	$ 0
Clothing	$ 0	$ 0
Laundry and dry-cleaning	$ 0	$ 0
Medical and dental expenses	$ 0	$ 0
Transportation (not including motor vehicle payments)	$ 0	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ 0
Insurance (not deducted from wages or included in mortgage payments)	$ 0	$ 0
Homeowner's or renter's	$ 0	$ 0
Life	$ 0	$ 0
Health	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
	$ 0	$ 0
Taxes (not deducted from wages or included in mortgage payments) (specify): _____	$ 0	$ 0
Installment payments	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
Credit card (name): _____	$ 0	$ 0
Department store (name):_____	$ 0	$ 0
Other: _____	$ 0	$ 0

Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ 0
Other (specify): _____	$ 0	$ 0
Total monthly expenses:	$ 0	$ 0

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?
____Yes ____No If yes, describe on an attached sheet. Idont Know

10. Have you paid -- or will you be paying -- an attorney any money for services in connection with this case, including the completion of this form? ____Yes __X_No
If yes, how much? $_____
If yes, state the attorney's name, address, and telephone number:
_____
_____
_____

11. Have you paid -- or will you be paying -- anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?
____Yes __X _No
If yes, how much? $_____
If yes, state the person's name, address, and telephone number:
_____
_____
_____

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.
I have no income, I have been imprisoned for the past 9 years.

13. State the address of your legal residence.
Westville Correctional Facility p.o. Box 473
Westville, In. 46391
Your daytime phone number: (___) None
Your age: 42 Your years of schooling: GED
Your social-security number: 267-37-7348

CERTIFICATE

I certify that the applicant named herein has the sum of $ 2.61 on account to his credit at LVCF, the institution where he is confined. I further certify that the applicant likewise has the following securities to his credit according to the records of said institution: NONE

I further certify that during the last six months the applicant's average balance in his trust fund account was $ 2.50.

Authorized Officer of Institution

REQUIRED CERTIFICATIONS

Attach to this motion and affidavit: 1) a certified copy of your trust fund account statement (or institutional equivalent), if available, for the six-month period immediately preceding the filing of this action, AND 2) the completed Certificate which follows.

BEST AVAILABLE COPY

LOC: WVC TRANSACTION HISTORY INQUIRY USER: WVC191

OFFENDER NO 940891 NAME: FINFROCK JOSEPH

FROM DATE: 02 / 03 / 2000 TO DATE: 08 / 03 / 2000 STATUS: AC HSE UNIT:

ENDING BALANCE (END OF MONTH) = $2.61

DOCMT NUMBER	TRAN CODE	DESCRIPTION	TRAN TYPE	POST DATE	BATCH NO.	TRAN AMOUNT	ACCOUN NUMBE
WVC 07/27	COMM	46482 / 081	D	07/27/2000	004	$5.75	94089
GHU PK	SP06		C	07/25/2000	008	$8.19	94089
WVC 06/29	COMM	41973 / 069	D	06/29/2000	004	$5.86	94089
GHU PK	SP05		C	06/27/2000	009	$6.02	94089
WVC 06/15	COMM	39657 / 067	D	06/15/2000	005	$0.03	94089
WVC 06/08	COMM	38659 / 066	D	06/08/2000	004	$19.96	94089
0154501475	POMO	C.EASTON	C	05/23/2000	005	$20.00	94089
WVC35052	MEDC	J. FINFROCK	D	05/01/2000	004	$0.15	94089

PAGE : 0001
TRANSACTION INQUIRY COMPLETE
PF2=DISPLAY TRANSACTIONS PF7=PG/UP PF8=PG/DN *PF9=CLEAR SCREEN* PF10=EXIT

Nothing Further. CWM 8/3-00

Case Number 00-483

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CRAIG A. HANKS, *Superintendent,*
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Petitioner,

vs.

JOSEPH W. FINFROCK,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

HOWARD B. EISENBERG

P.O. Box 1476
Milwaukee, WI. 53201-1476

(414) 288-1768
FAX (414) 288-6403
E-MAIL: Howard-Eisenberg@excite.com

ATTORNEY FOR RESPONDENT

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BRIEF IN OPPOSITION

ARGUMENT

THIS COURT SHOULD DENY THE CERTIORARI PETITION BECAUSE THE ISSUE RAISED IS A MINOR QUESTION OF HABEAS CORPUS PROCEDURE WHICH SHOULD BE ADDRESSED TO CONGRESS AND WHICH WAS PROPERLY RESOLVED BY THE SEVENTH CIRCUIT.

A. Role of Counsel

Respondent did not ask the Seventh Circuit to appoint counsel to represent him before that Court. Nevertheless, the Court of Appeals appointed the undersigned to argue several issues as *amicus curiae* generally supporting Respondent, but not as

Respondent's counsel. Those issues are listed on page 6, footnote 6, of the Petition for Writ of Certiorari.[1]

Amicus argued that Finfrock properly filed these cases as habeas corpus actions under 28 U.S.C. §2254, and that, as habeas corpus actions, the provisions of the Prison Litigation Reform Act (PLRA), which amended 28 U.S.C. §1915, did not apply to this action. This position was opposed by both the Government of the United States and the State of Indiana. The Court of Appeals agreed with Amicus on those two points.

On the third point, Amicus argued that a certificate of appealability was required to appeal an adverse judgment in such a §2254 case. Mr. Finfrock vehemently objected to this position and, ultimately, the Court of Appeals agreed with Finfrock and not Amicus.

Now that the State of Indiana has sought certiorari, Mr. Finfrock has asked the undersigned to represent him in opposing the petition. However, counsel feels an obligation to acknowledge that the position he will take in this brief is somewhat different than, and, indeed, inconsistent with, the position he took as Amicus.

B. The Statute Plainly Does Not Require a Certificate of Appealability in a Case Challenging the Loss of Good Time Credits as the Result of Prison Discipline.

The certificate of appealability requirement is statutory, and the statue is clear.

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[1] On several occasions the Seventh Circuit has appointed the undersigned *amicus curiae* to argue issues the Court desired briefed when the party was not represented by counsel. Most recently, the Court appointed him *amicus* to argue an issue on behalf of a *pro se*, but non-indigent, Holocaust survivor who is seeking reparations from Germany for enslaving him during World War II. *Sampson v. Federal Republic of Germany*, Case No. 97-3555, order dated February 8, 2000. These are *pro bono* appointments.

Section 2253(c)(1) reads:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

One of the most obvious things about this statute is that subsection (c)(1)(B) requires a certificate of appealability in *all* cases under 28 U.S.C. §2255, but not in all §2254 cases. Subsection (c)(1)(A) could just as easily have required certificates of appealability in all cases seeking review of "the final order in a proceeding under section 2254." But the statute does not say that.

Instead, Congress limited the need for a Certificate of Appealability to only those cases "in which the detention complained of arises out of process issued by a State court." There is simply no way the present case involves "process issued by a State court." The only complaint Finfrock makes in these actions is that he lost good time, thereby extending his prison time. This decision was not made by a state court. In fact, Indiana forbids prisoners from seeking review of prison disciplinary decisions in any state court. *See, Hasty v. Broglin*, 531 N.E.2d 200 (Ind. 1988). Therefore, at least in Indiana where judicial review of prison disciplinary decisions is impossible, Respondent's "complaint" simply can not arise out of process issued by a state court.

These habeas actions do not relate to anything that ever happened in a state court. Most specifically, these actions do not relate to Respondent's criminal conviction or any evidence, issue, or legal matter that arose in those criminal proceedings or in any

state court. This case no more "arises out of process issued by a state court" than if Finfrock had filed a 1983[2] action, alleging that he was provided inadequate medical care while incarcerated serving his state sentence.

As Congress demonstrated in the very next clause in §2253, it knows how to make a section all-inclusive, if that is what it wanted to do. Indeed, if Congress disagrees with the Seventh Circuit's approach, it can amend the statute and overturn the decision. But, based on the statute as it now exists, the decision of majority of all of the members of the Seventh Circuit was correct and mandated by the clear specification of the statute. There is no reason to review that decision.

C. *This Petition Raises an Arcane Issue of Habeas Corpus Procedure That Will Affect Very Few Cases, There Is No True Conflict Between the Circuits, and Any Concern Regarding the Meaning of the Statutes Should Be Addressed to Congress, and Not the Court.*

For Indiana prisoners, the United States District Court is the court-of-first-instance if the inmate wants to contest his loss of good time. Indiana denies prisoners any type of judicial review for such deprivations. *See, Hasty v. Broglin*, 531 N.E.2d 200 (Ind. 1988). Thus, if the Indiana Attorney General is burdened by having to respond to prisoner disciplinary habeas corpus cases in federal court[3], the problem rests with the Indiana Supreme Court and legislature, not with the federal judiciary. Moreover, if Judge Easterbrook is correct that there are more than one hundred prisoner disciplinary habeas corpus cases each year in the Seventh Circuit–and he cited nothing (*Petition* at 31a) to

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[2] 42 U.S.C. §1983.

[3] *See* footnote 4, at page 10 of the Petition.

support his speculation–one will find that the vast majority of such cases come from Indiana, the single state in the circuit which forecloses state court review of such claims.

Moreover, there is nothing to support Petitioner's assertion that the Seventh Circuit's opinion in this case "affects large number of cases" (*Petition* at 10). Indeed, the State does not cite *a single case* in which any federal court of appeals has required a certificate of appealability in a case in which a prisoner seeks habeas corpus review of a prison disciplinary decision. Petitioner claims that *Hallmark v. Johnson*, 118 F.3d 1073, 1076 (5th Cir. 1997) conflicts with the decision in this case, but a review of *Hallmark* reveals that the Fifth Circuit decided that the Antiterrorism and Effective Death Penalty Act (AEDPA) did *not* apply to those cases. *Montez v. McKinna*, 208 F.3d 862 (10th Cir. 2000) did not involve a prison disciplinary case at all, but rather was a case involving the transfer of an inmate to an out of state prison. It is highly questionable whether such a claim can be pursued under §2254. *See Moran v. Sondalle*, 218 F.3d 647 (7th Cir. 2000) (forbidding use of §2254 to attack prison transfers). In *Montez* one judge dissented, and a review of the unpublished decisions cited by the *Montez* majority suggest that the two panel members were not even stating the majority rule in that circuit, *Montez*, 208 F.3d at 866, n. 5. Although it is true that both *Montez* and *Hallmark* contain *dicta* that is inconsistent with Judge Wood's opinion in this case, neither of these cases constitute the type of split among the circuits that warrants this Court's consideration of the issue.

In its zeal to restrict prisoner access to federal courts, Congress failed to consider the ramifications of the well established line of cases which requires prisoners to file

§2254 actions, and not §1983 actions, if they wanted to attack the loss of good time.[4] At the time *Preiser* and *Heck* were decided, those who wanted to restrict prisoner litigation in federal court favored the §2254 approach because it required exhaustion of state court remedies, thus delaying and, perhaps, preventing, federal court litigation of such matters.

But in 1996 Congress enacted far broader restrictions on prisoners' access to the federal courts. Within the space of a few days Congress adopted legislation which shut down most prisoner civil rights litigation through the Prison Litigation Reform Act, while it greatly limited habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996. But in their haste to pass politically popular legislation, Congress failed to take cognizance of this small subset of habeas corpus actions–those challenging the loss of good time.

As the Seventh Circuit's decision in this case shows, this legislative oversight has caused the federal courts to grapple with complex issues. Indeed, what is most remarkable about the State of Indiana's certiorari petition is that Petitioner does not seek review of the most significant issue in this case, whether the Prison Litigation Reform Act restrictions apply to habeas actions which seek restoration of lost good time. Instead, Petitioner asks this Court to review a tiny, little, issue that primarily affects only Indiana.

As this case well indicates, Congressional sloppiness in drafting both the PLRA and the AEDPA has led to almost as much litigation as it has foreclosed. The Seventh

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[4] *E.g. Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994); *Edwards v. Balisok*, 520 U.S. 641 (1997)

Circuit applied the clear mandate of the statute. That was correct and proper. If Petitioner is unhappy with this result, the State of Indiana should address its concern to the legislative branch of the federal government, and not this Court.

D. *If a Prisoner Attempts to Appeal a Frivolous Habeas Corpus Case, the District Court or Court of Appeals Can Deny IFP Status, Thus Eliminating the Specter of the Federal Courts Being Flooded with Frivolous Appeals from Prison Disciplinary Habeas Corpuses.*

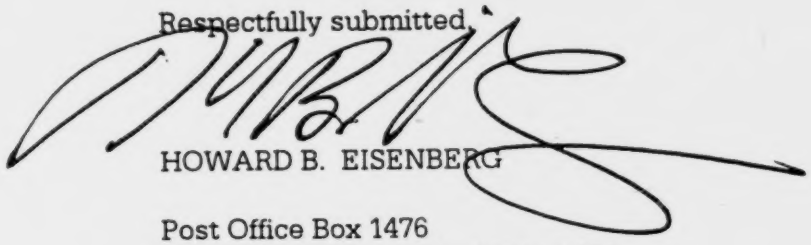
Petitioner is wrong when he asserts that the Seventh Circuit's opinion in this case will lead to increased frivolous appellate litigation (*Petition* at 12). Indeed, on the same day this case was decided by the Court of Appeals, it also decided *Moran v. Sondalle*, 218 F.3d 647 (7th Cir. 2000) which held that a habeas corpus petitioner who tries to pursue a frivolous appeal in a habeas corpus case should be denied *in forma pauperis* status by the district court. It was no mere coincidence that this case and *Moran* were decided the same day. The *Moran* panel referred to the court's decision in the instant case and clearly intended to establish a system whereby frivolous appeals were curtailed, even in cases in which no certificate of appealability was required.

Federal courts have ample weapons to sanction frivolous litigants and to dispose of frivolous appeals. The lack of certificates os appealability in these few cases is hardly an occasion to bemoan any floodgates that may have been opened by the Seventh Circuit's decision.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



HOWARD B. EISENBERG

Post Office Box 1476
Milwaukee, Wisconsin 53201-1476

Telephone (414) 288-1768
FAX (414) 288-6403
E-MAIL: Howard-Eisenberg@excite.com

ATTORNEY FOR RESPONDENT

HBE
October 15, 2000